TABLE OF CONTENTS

	Page
Petition	1
Summary Statement	2
Order and Opinion Below	2
Jurisdiction	3
Question Presented	3
Reasons Relied on for Writ of Certiorari	3
Argument	4
Conclusion	7

Table of Cases

Chicot County v. *Sherwood*, 148 U. S. 529, 533; 37 L. Ed. 546, 548	6
Gillis v. *Keystone Mutual Casualty Co.*, 172 Fed. (2) 826	3, 4
Hyde v. *Stone*, 20 Howard 170-176, 15 L. Ed. 874-875	5
Kline v. *Burke Construction Company*, 260 U. S. 226, 67 L. Ed. 226	6

Table of Rules and Statutes

Federal Rules of Civil Procedure:	
Rule 61	3
Judicial Code:	
Sec. 240 (a), U. S. C. A. Title 28, Sec. 347	3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 164

JOHN R. GILLIS, DOING BUSINESS AS THE GILLIS VAN SERVICE AND THE GILLIS VAN SERVICE, A CORPORATION, *Petitioners,*

vs.

KEYSTONE MUTUAL CASUALTY COMPANY, A CORPORATION, M. D. HOFFMAN, N. P. KANN, E. J. KANN, D. L. McLOY, A. J. O'LEARY, J. D. McNEIL, H. D. GOLDMAN, S. H. HARTMAN, E. R. HOSSINGER, R. KOPPELMAN, E. J. NUREMBERG AND F. R. SACK, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF FOR PETITIONERS.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

John R. Gillis, doing business as the Gillis Van Service and the Gillis Van Service, a corporation, pray that a writ of certiorari issue to review the judgment and order entered April 5, 1949, ordering that the Bill of Complaint of Petitioners against the Respondents be finally dismissed.

Summary Statement

This case presents an important question of law and practice. No question of fact is involved. The Respondent corporation, a citizen of Pennsylvania, was brought before the Court by the acceptance of service of process by the Director of Insurance of the State of Kentucky (R. 44), such service being provided for by Kentucky Statute. The Respondent is not represented by counsel. No Receiver, Liquidator, nor other representative of the Respondent corporation, has made any appearance for it in this case.

The sole issue in this case is whether the District Court of the United States had jurisdiction of this cause. The District Court dismissed the cause for lack of jurisdiction. The Circuit Court of Appeals held the District Court did have jurisdiction, in that the amount involved was more than $3,000, and the requisite diversity of citizenship existed, but affirmed the lower court on the erroneous ground that the dismissal was not prejudicial to the rights of the Petitioners.

Order and Opinion Below

The District Court for the Eastern District filed no opinion, but entered the following order: (R. 46)

> "Pursuant to an order entered herein on June 18, 1948, assigning the above styled case for trial on Monday, June 21, 1948, at 10 o'clock A. M., and the case being called in open court, and plaintiffs being represented by J. A. Edge, and no attorney or other person appearing on behalf of the defendants, the Court announced, after due consideration of the allegations contained in the petition, it is the opinion of the Court, and it is ordered that the case be dismissed for lack of jurisdiction.
>
> (S.) H. Church Ford,
> *Judge, U. S. District Court.*

The opinion of the United States Court of Appeals for the Sixth Circuit is reported in 172 Fed. (2) 826.

Jurisdiction

Jurisdiction is conferred on this Court to review this cause on writ of certiorari by Section 240 (a) of the Judicial Code as amended by the Act of February 13th, 1925, (U. S. C. A., Title 28, Sec. 347).

The Question Presented

The question presented by the record is whether the dismissal of this cause by the District Court for lack of jurisdiction, when in point of fact and law it had full jurisdiction, is a harmless error under Rule 61 of the Federal Rules of Civil Procedure entitling the Petitioner to no relief, or whether it is a prejudicial error, as claimed by Petitioner, depriving him of valuable property rights and above all, the right to a trial in a Federal forum.

Reasons Relied On For Writ of Certiorari

In this action the plaintiffs sought a personal recovery of over $1500.00 (R. 19), the premium on a policy of insurance issued by the Respondent company. Recovery is sought on the ground of fraudulent representations in procuring policyholder to take and pay for the policy.

Petitioner also sought to recover $5,000.00 in damages from the company for breaching its contract and cancelling the insurance, leaving the Petitioner, the owner of a fleet of vans, discredited in various parts of the United States, and its policy suddenly and wrongfully cancelled. (R. 32)

Petitioner also sought, as a class representative, to cancel all other policies issued in the State of Kentucky and to recover for the benefit of the policyholders, the premiums paid thereon, shown to be approximately $200,000. (R. 31).

The Company being a mutual assessment concern, its policyholders are subject to an assessment for the benefit of creditors and in the instance of your Petitioner, subject to a possible and probable assessment of over $15,000. (R. 21) The petitioner is mulcted with the costs of this proceeding in the District Court and in the Circuit Court of Appeals.

The opinion of the lower Court discloses the requisite diversity of citizenship between the parties, and an amount in excess of $3,000, and sufficient to sustain jurisdiction.

The policyholder, your Petitioner, presented these claims as a personal right. The policyholder also applied to the Court for the appointment of a receivership, and certain injunctive relief and other relief within the sound discretion of the Chancellor.

In this situation the Circuit Court of Appeals held jurisdiction inhered in the lower Court, but sustained the dismissal on the ground that certain relief was of a discretionary character, not encumbent on the Court to grant. We think it prejudicial error certainly to refuse judgment for the monetary recovery, for the cancellation of the policies, and for the damages sustained, and for the costs of this action.

Argument

The bill of complaint contained a cause of action within the jurisdiction of the Court. This, the Circuit Court of Appeals decided. The Circuit Court of Appeals did not discuss the claims of the Petitioner in presenting his personal and property rights in the case.

The Circuit Court of Appeals based its decision upon certain rules of comity existing between courts in conflicting applications for receivership. (*Gillis* v. *Keystone Mutual Casualty Company,* 172 Fed. (2) 828). There were no

conflicting applications for receivership before the District Court, but had there been conflicting applications for the constitution or appointment of a receiver, that was a matter within the jurisdiction of the District Court and should have been relegated to it.

The Court was asked to appoint a receiver, it is true. He could have appointed his own receiver, a resident of Kentucky, or had the Court deemed it necessary, he could have appointed the Pennsylvania Liquidator, had he appeared and made application to be appointed such Liquidator or receiver. But he did not appear and there was no conflict as to receiverships even if the Court had decided to appoint a receiver.

We submit that the uncontested and undenied allegations of the petition were sufficient to justify the appointment of the receivership sought. We think the facts should have appealed successfully to the discretion of the Court for the appointment of such a receiver, but be that as it may, the petitioner was certainly entitled to have a judgment of the District Court awarding him the return of his premiums, to have assessed the damages for breach of the contract, to have granted relief against the menacing assessments, to have decreed a cancellation of all policies, a restoration of all premiums, and to have awarded the plaintiff his costs.

We find no precedent, or authority, for the Court in such circumstances denying Federal jurisdiction to litigants situated as was the Petitioner.

In *Hyde, et al.*, v. *Stone,* 20 Howard 170-176, 15 L. Ed. 874-875, this Court said:

> "But this Court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States which pre-

scribe the modes of redress in their courts or which regulate the distribution of their judicial power. In many cases, state laws form a rule of decision for the courts of the United States, and the forms of proceeding in these courts have been assimilated to those of the States, either by legislative enactment or by their own rules. But the courts of the United States are bound to proceed to judgment and to afford redress to suitors before them, in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction."

In *Kline* v. *Burke Construction Company*, 260 U. S. 226, 67 L. Ed. 226, this Court, citing authorities, said:

"The Construction Company, however, had the undoubted right under the statute to invoke the jurisdiction of the Federal court, and that court was bound to take the case and proceed to judgment. It could not abdicate its authority or duty in favor of the state jurisdiction. Chicot County *v.* Sherwood, 148 U. S. 529, 533, 37 L. Ed. 546, 548, 13 Sup. Ct. Rep. 695, McClellan *v.* Carland, 217 U. S. 268, 282, 54 L. Ed. 762, 767, 30 Sup. Ct. Rep. 501."

In *Chicot County* v. *Sherwood*, 148 U. S. 529, 533, 37 L. Ed. 546, 548, this Court said:

"But the courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction. Suydam *v.* Broadnax, 39 U. S. 14 Pet. 67 (10:357); Union Bank of Tennessee *v.* Vaiden, 59 U. S. 18 How. 503 (15:472). This principle has been steadily adhered to by this court."

In the case at bar no direct Statute nor procedure was brought before the Circuit Court of Appeals, but it seemed

influenced by the thought that as a receivership proceeding was pending in some other state that such a proceeding might be embarrassed by a proceeding in the Courts of Kentucky. Such a consideration could only apply to the application for the receivership and certain injunctive relief, but should not have influenced a decision denying to the Petitioner Federal jurisdiction of his right to a monetary recovery, a recovery of damages caused by breach of his contract, and for relief against a ruinous assessment, alleged in the petition to be in excess of $15,000, nor to have deprived him, in a representative capacity, on behalf of other policyholders, a recovery of all premiums contributed by them, and should not have related to such an order as would subject him to the payment of the costs in the proceeding.

Conclusion

We respectfully pray that the Petition for a writ of certiorari be granted.

J. A. Edge,
Lena M. Craig,
Attorneys for Petitioners.

(3278)